6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR 360

RIN 3064-AE32

Notice of Proposed Rulemaking to Revise a Section Relating to the Treatment of Financial Assets Transferred in Connection with a Securitization or Participation

AGENCY: Federal Deposit Insurance Corporation ("FDIC").

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The FDIC is proposing a rulemaking that would revise certain provisions of its securitization safe harbor rule, which relates to the treatment of financial assets transferred in connection with a securitization or participation, in order to clarify the requirements of the Securitization Safe Harbor as to the retention of an economic interest in the credit risk of securitized financial assets upon and following the effective date of the credit risk retention regulations adopted under Section 15G of the Securities Exchange Act.

DATES: Comments on the Proposed Rule must be received by [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

You may submit comments, identified by RIN number, by any of the following methods:

- **Agency Web Site:** http://www.FDIC.gov/regulations/laws/federal_. Follow instructions for submitting comments on the agency web site.
- **E-mail:** Comments@FDIC.gov. Include RIN 3064-AE32 in the subject line of the message.
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- **Hand Delivery/Courier**: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.
- **Federal eRulemaking Portal**: http://www.regulations.gov. Follow the instructions for submitting comments.

Instructions: All comments will be posted without change to http://www.fdic.gov/regulations/laws/federal/_, including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275-3342 or (703) 562-2200.

FOR FURTHER INFORMATION CONTACT:

George H. Williamson, Manager, Division of Resolutions and Receiverships, (571) 858-8199.

Phillip E. Sloan, Counsel, Legal Division, (703) 562-6137.

SUPPLEMENTARY INFORMATION

I. Background

The Federal Deposit Insurance Corporation (FDIC), in regulations codified at 12 CFR 360.6 (the Securitization Safe Harbor Rule), set forth criteria under which in its capacity as receiver or

conservator of an insured depository institution the FDIC will not, in the exercise of its authority to repudiate contracts, recover or reclaim financial assets transferred in connection with securitization transactions. Asset transfers that, under the Securitization Safe Harbor Rule, are not subject to recovery or reclamation through the exercise of the FDIC's repudiation authority include those that pertain to certain grandfathered transactions, such as, for example, asset transfers made prior to December 31, 2010 which satisfied the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under generally accepted accounting principles (GAAP) in effect for reporting periods prior to November 15, 2009 and which pertain to a securitization transaction that satisfied certain other requirements. In addition, the Securitization Safe Harbor Rule provides that asset transfers that are not grandfathered, but that satisfy the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009 and that pertain to a securitization transaction that satisfies all other conditions of the Securitization Safe Harbor Rule (such asset transfers, together with grandfathered asset transfers, are referred to collectively as Safe Harbor Transfers) will not be subject to FDIC recovery or reclamation actions through the exercise of the FDIC's repudiation authority. For any securitization transaction in respect of which transfers of financial assets do not qualify as Safe Harbor Transfers but which transaction satisfies all of its other requirements, the Securitization Safe Harbor Rule provides that, in the event the FDIC as receiver or conservator remains in monetary default for a specified period under a securitization due to its failure to pay or apply collections or repudiates the securitization asset transfer agreement and does not pay damages within a specified period, certain remedies can be exercised on an expedited basis.

Paragraph (b)(5)(i) of,the Securitization Safe Harbor Rule sets forth the conditions relating to credit risk retention that apply to transfers of financial assets in connection with securitizations that are not grandfathered by the Securitization Safe Harbor Rule. Under paragraph (b)(5)(i)(A) of the Securitization Safe Harbor Rule, prior to the effective date of regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.* ("Section 15G"), the documents governing such securitization must require that the sponsor retain an economic interest in not less than five (5) percent of the credit risk of the financial assets relating to the securitization. The requirement in paragraph (b)(5)(i)(A) of the Securitization Safe Harbor Rule, that *the documents* require retention of an economic interest is consistent with many other provisions of the Securitization Safe Harbor Rule, which are similarly expressed as requirements for the securitization documentation, rather than as conditions requiring actual compliance with the provision that is required to be included in the documentation. Paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule does not explicitly refer to the securitization documentation, but provides that, upon the effective date of the regulations required under Section 15G (the Section 15G Regulations), such regulations shall exclusively govern the requirement to retain an economic interest in the credit risk of the financial assets.

Section 15G provides that regulations issued thereunder become effective with respect to residential mortgage securitizations one year after the date on which the regulations are published in the Federal Register and, with respect to all other securitizations, two years after such publication date. The Section 15G Regulations were published in the Federal Register at 79 FR 77602 on December 24, 2014. The Federal Register publication of the Section 15G Regulations specifies "compliance dates" that correspond to these effective dates. However, the Federal Register publication also specifies February 23, 2015 as the "effective date" of the

Section 15G Regulations in accordance with Federal Register editorial conventions, which require that a Federal Register publication specify as the effective date the date on which a rule affects the current Code of Federal Regulations.[1] The Proposed Rule is designed, in part, to eliminate any confusion that might be created by the use of "effective date" in this way and to clarify when compliance with paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule is required.

In connection with the notice of proposed rulemaking relating to the Section 15G Regulations, FDIC staff received a comment that suggested that certain points relating to paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule should be clarified, and in following up on the comment, the FDIC identified two points that are addressed in the Proposed Rule. The first is a clarification that paragraph (b)(5)(i)(B) was intended to require that, upon and following the effective date of the Section 15G Regulations, the Securitization Safe Harbor Rule requirements as to risk retention are satisfied if the governing documents of a securitization transaction require retention of an economic interest in the financial assets in accordance with the Section 15G Regulations, and that if the documentation satisfies this condition (and assuming all other conditions of the Securitization Safe Harbor Rule are satisfied), the transaction will not lose the benefits of the safe harbor solely on the basis of any non-compliance with the Section 15G Regulations risk retention requirements.

The second is a clarification that paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule does not require that any action be taken with respect to issuances of asset-backed securities that close prior to the effective date of the Section 15G Regulations.

---

[1] See 79 FR 77602 (December 24, 2014).

II. Discussion

In the FDIC's view it is important to make clear to securitization market participants the date upon and after which the Securitization Safe Harbor will require reference to the Section 15G Regulations. In addition, the FDIC wants to eliminate possible confusion among market participants as to whether an asset-backed security issuance that complies with all requirements of the Securitization Safe Harbor Rule could forfeit the benefits afforded by the Securitization Safe Harbor Rule based on the action or inaction of a securitization sponsor or other party with respect to retention of credit risk following the date of such issuance. The Proposed Rule would clarify that, if the documents require compliance with the Section 15G Regulations, the benefits of the Securitization Safe Harbor Rule are not forfeited based solely upon non-compliance with these requirements. This is different from the Section 15G Regulations, under which non-compliance with the credit risk retention requirements will constitute a violation of the Regulations.

Accordingly, the Proposed Rule would revise paragraphs (b)(5)(i)(A) and (b)(5)(i)(B) of the Securitization Safe Harbor Rule to make the following three points clear:

(i) In order to qualify for the benefits of the Securitization Safe Harbor Rule, the documents governing the issuance of asset-backed securities in a securitization transaction must require retention of an economic interest in the credit risk of the financial assets relating to the securitization transaction in compliance with the Section 15G Regulations if such issuance occurs upon or following the date on which compliance with Section 15G is required for such type of securitization transaction;

(ii) The Securitization Safe Harbor Rule does not require inquiry as to whether the sponsor or other applicable party in fact complies with the risk retention requirements of the documentation; and

(iii) The Securitization Safe Harbor Rule requirements as to the Section 15G Regulations do not require changes to securitization documents governing asset-backed security issuances that are closed prior to the date on which compliance with Section 15G is required for such type of issuances.

The FDIC is proposing the clarifications described in points (ii) and (iii) above in recognition of the fact that the benefits afforded by the Securitization Safe Harbor Rule were intended to provide certainty to investors as to certain matters relating to the course of conduct by the FDIC as receiver or conservator of an insured depository institution with respect to financial assets transferred by such insured depository institution. It would be inconsistent with this goal if the treatment under the Securitization Safe Harbor Rule by the FDIC as receiver or conservator of an institution that transferred financial assets in connection with the issuance of such securities could be dependent on post-closing actions with respect to credit risk retention that are beyond the control of investors.

III. **Request for Comment**

The FDIC invites comment from all members of the public on all aspects of the Proposed Rule. Comments are specifically requested on whether the Proposed Rule is consistent with the purposes of section 360.6 and whether the results intended to be achieved by the Proposed Rule will be and should be achieved as set forth in the Proposed Rule or by way of different

modifications to the Securitization Safe Harbor Rule. The FDIC will carefully consider all comments that relate to the Proposed Rule.

IV. Administrative Law Matters

A. *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq*.) ("PRA") the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Proposed Rule would not revise the Securitization Safe Harbor Rule information collection 3064-0177 or create any new information collection pursuant to the PRA. Consequently, no submission will be made to the Office of Management and Budget for review. The FDIC requests comment on its conclusion that this NPR does not revise the Securitization Safe Harbor Rule information collection, 3064-0177.

B. *Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires an agency to provide an Initial Regulatory Flexibility Analysis with a proposed rule, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603-605. The FDIC hereby certifies that the Proposed Rule would not have a significant economic impact on a substantial number of small entities, as that term applies to insured depository institutions.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat.1338, 1471) requires the Federal banking agencies to use plain language in all proposed and final rules published after

January 1, 2000. The FDIC has sought to present the Proposed Rule in a simple and straightforward manner.

List of Subjects in 12 CFR Part 360

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and recordkeeping requirements, Savings associations, Securitizations.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend 12 CFR Part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

1. The authority citation for Part 360 continues to read as follows:

Authority: 12 U.S.C. 1817(b), 1818(a)(2), 1818(t), 1819(a) Seventh, Ninth and Tenth, 1820(b)(3), (4), 1821(d)(1), 1821(d)(10)(c), 1821(d)(11), 1821(d)(15)(D), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101-73, 103 Stat. 357.

2. Revise § 360.6 paragraph (a) Defiinitions by adding the definition "Applicable compliance date" as (a)(1) and redesignating the remaining definitions in numerical order to read as follows:

§360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(a) * * *

(1)*Applicable compliance date* means, with respect to a securitization, the date on which compliance with Section 15G of the Securities Exchange Act, 15 U.S.C. 78a et seq., added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act is required with respect to that securitization.

* * * * *

3. Revise § 360.6 paragraph (b)(5)(i) to read as follows:

(i) *Requirements applicable to all securitizations*.

(A) Prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a et seq., added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall require that the sponsor retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be sold, pledged or hedged, except for the hedging of interest rate or currency risk, during the term of the securitization.

(B) For any securitization that closes upon or following the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq*., added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall instead require retention of an economic interest in the credit risk of the financial assets in accordance with such regulations, including the restrictions on sale, pledging and hedging set forth therein.

* * * * *

Dated at Washington, D.C., this 21st day of January, 2015.

By order of the Board of Directors.
Federal Deposit Insurance Corporation

Robert E. Feldman
Executive Secretary

[FR Doc. 2015-01444 Filed 01/29/2015 at 8:45 am; Publication Date: 01/30/2015]